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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Jan T. Hornbacher

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Serial No. 76/179,384

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Robert L. Farris of Reising, Ethington, Barnes, Kisselle, Learman & McCulloch, P.C. for Jan T. Hornbacher.

William H. Dawe, III, Trademark Examining Attorney, Law Office 108 (David Shallant, Managing Attorney).

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Before Cissel, Hanak and Drost, Administrative Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

On December 12, 2000, Jan T. Hornbacher (applicant) applied to register the mark BARCODE APPAREL and design, shown below, on the Principal Register for “clothing, namely, shirts, trousers, coats and hats” in International Class 25.[1] Applicant has disclaimed the word “Apparel.”

[1] Serial No. 76/179,384. The application contained an assertion of a date of first use and a date of first use in commerce of November 15, 2000.

The examining attorney refused to register the mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), because of a registration for the mark BAR CODE, in typed form, for "clothing and apparel, namely, hats, shoes, gloves, belts, pullovers, jogging suits, T-shirts, shirts, tank tops, pants, shorts, jeans, sweaters, coats, jackets and sweatshirts" in International Class 25.[2]

After the examining attorney made the refusal final, this appeal followed.

In a case involving a refusal under Section 2(d), we analyze the facts as they relate to the relevant factors set out in In re Majestic Distilling Co., 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). See also In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); Recot, Inc. v. Becton, 214 F.3d 1322, 54 USPQ2d 1894, 1896 (Fed. Cir. 2000).

We begin by comparing applicant's and registrant's marks. Applicant's mark consists of the words BARCODE

[2] Registration No. 2,082,403 issued July 22, 1997.

APPAREL and the design of a bar code; registrant's mark consists of the words BAR CODE in typed form. We find that the marks are dominated by the word "Bar Code." It is the only word in the cited registration. The only difference between the way this term is used in the marks is that applicant spells BARCODE without a space while registrant spells it as two words. The absence of the space is not a significant difference between the marks. Seaguard Corp. v. Seaward International, Inc., 223 USPQ 48, 51 (TTAB 1984) (SEA GUARD and SEAGUARD are "essentially identical").

Applicant's mark also includes the word "apparel," but this term has been disclaimed and it is clearly, at the very least, highly descriptive of applicant's goods. In a similar case, the Federal Circuit held that the addition of the word "Swing" to registrant's mark "Laser" did not result in the marks being dissimilar. "[B]ecause both marks begin with 'laser,' they have consequent similarities in appearance and pronunciation. Second, the term 'swing' is both common and descriptive… Regarding descriptive terms this court has noted that the descriptive component of a mark may be given little weight in reaching a conclusion on likelihood of confusion." Cunningham v. Laser Golf Corp., 222 F.3d 943, 55 USPQ2d 1842, 1845-45 (Fed. Cir. 2000) (citations and quotation marks omitted). The term

"apparel" is even less likely to be significant here because both applicant's and registrant's goods are apparel and registrant uses the term to identify its goods ("clothing and apparel").

The only other difference between the marks is applicant's design. Applicant admits that its "mark is the phrase "BARCODE APPAREL" in the center of a bar code representation." Brief at 5. Rather than creating a different commercial impression, the bar code design reinforces the association of applicant's mark with the word BAR CODE in the cited registration.

When we view the marks in their entireties, we find that they are dominated by the virtually identical term "bar code" and that the marks are very similar in sound, appearance, meaning, and commercial impression.

Next, we discuss the goods. Applicant admits that the "registration includes all of the goods listed in appellant's application." Appeal Brief at 6. Thus, applicant's goods are identical to goods in the cited registration. "When marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines." Century 21 Real Estate Corp. v. Century Life of

America, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992).

In addition, applicant maintains without any supporting evidence that there may be differences in the channels of trade and prospective purchasers of the goods.[3] However, the identification of goods of applicant and registrant contain no limitations. Therefore, we do not read in limitations even if there is evidence of record on this point, and we must presume that the channels of trade and purchasers are identical. Squirtco v. Tomy Corp., 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983)("There is no specific limitation and nothing in the inherent nature of Squirtco's mark or goods that restricts the usage of SQUIRT for balloons to promotion of soft drinks. The Board, thus, improperly read limitations into the registration"); Schieffelin & Co. v. Molson Companies Ltd., 9 USPQ2d 2069, 2073 (TTAB 1989) ("[M]oreover, since there are no restrictions with respect to channels of trade in either applicant's application or opposer's registrations, we must assume that the respective products travel in all normal channels of trade for those alcoholic beverages").

[3] We note that applicant's counsel asserts that "Appellant is not aware of any use of the mark in Registration No. 2,082,403 other than in the Registration." Brief at 8.

While applicant maintains that he has no information concerning the fame of the registered mark, the absence of evidence of fame is of no consequence. See Majestic Distilling, 65 USPQ2d at 1205 (citation omitted) ("Although we have previously held that the fame of a registered mark is relevant to likelihood of confusion, we decline to establish the converse rule that likelihood of confusion is precluded by a registered mark's not being famous").

Applicant has submitted copies of registrations of other trademark applications and registrations for the term "Bar Code" to support its argument that the term is weak. However, applicant admits that "Appellant's mark and the mark of Registration No. 2,082,403 are the only known marks for clothing that include the phrase "BARCODE" or "BAR CODE." Brief at 7. Therefore, at least when applied to the goods in the application and cited registration, the term BAR CODE is not weak. The fact that clothing items may have functional bar codes used in a non-trademark sense does not prevent the word BAR CODE from functioning as a trademark.[4]

[4] Of course, in this proceeding, we must presume the cited mark is valid and entitled to its statutory presumptions. In re Dixie Restaurants, 105 F.3d 1405, 41 USPQ 1531, 1534 (Fed. Cir. 1997).

Finally, applicant's counsel argues that there is no evidence of actual confusion. However, the "lack of evidence of actual confusion carries little weight." Majestic Distilling, 65 USPQ2d at 1205.

We conclude that when the marks BAR CODE and BARCODE APPAREL and the design of a bar code are used on the same clothing items, there is a likelihood of confusion.

Decision: The refusal to register applicant's mark under Section 2(d) is affirmed.